

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Qwest Corporation for Forbearance)	
Pursuant to 47 U.S.C. § 160(c) in the Omaha)	WC Docket No. 04-223
Metropolitan Statistical Area)	
)	

**REPLY COMMENTS OF THE AD HOC
TELECOMMUNICATIONS USERS COMMITTEE**

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SUMMARY

Ad Hoc agrees with the initial comments filed in this proceeding: Qwest's Petition is overly broad, with sloppy analysis and virtually no relevant evidence to support it. By contrast, Ad Hoc has presented evidence to the Commission repeatedly in recent years which demonstrates that competitive alternatives to the ILECs' services have yet to emerge for enterprise customers. Rather than dedicate its limited resources to Qwest's bold but analytically flimsy and unsupported Petition, the Commission should focus on retooling its regulatory regime for special access to address market failures for those services.

Ad Hoc is especially concerned by Qwest's apparent confusion regarding services provided to CLECs pursuant to Sections 251(c) and 271 of the Act; "telecommunications services" generally; and exchange access services provided to IXCs and end users under the Commission's access rules. In its petition, Qwest first defines the relevant market as "the market for services under Section 251(c) and selected services under Section 271." But Qwest seeks a finding of non-dominance as to *all* "telecommunications services" in "the Omaha MSA telecommunications market." And then Qwest demands relief from the price caps and rate of return regulations that apply to interstate access services.

In other words, Qwest defines a market for one service, makes claims about the competitive conditions for a different service, and on that basis requests forbearance for a third.

As Ad Hoc has repeatedly demonstrated in filings with the Commission, however, there are only limited competitive alternatives, and excessively high

prices, for the services Qwest wants de-regulated. The “fact gap” between the ILECs’ de-regulatory desires and marketplace realities continues to widen.

Contrary to the claims in Qwest’s petition, cable telephony in residential areas does not create competitive alternatives for enterprise customers in business districts. Similarly, wireless substitution by residential customers does nothing to address the competitive needs of enterprise customers or make wireless connections equivalent to wireline services in quality, ubiquity, security, reliability, and suitability for data needs.

Nor does VoIP undermine customer dependency on Qwest’s telecommunications services. Qwest’s claim that VoIP is a direct substitute for wireline telephone service is nonsensical; VoIP is merely another application that requires users to purchase a connection from Qwest or alternative providers before they can use it for telephony. Perhaps Qwest meant that VoIP allows other owners of transmission facilities, like cable companies, to provide telephony services. Since cable facilities rarely pass enterprise customer locations, however, and suffer from other technological limitations when it comes to the needs of enterprise customers, they do nothing to diminish large users’ reliance on ILEC-provided services. No matter how competitive the market may be for the services and equipment required for VoIP, customers and service providers must still buy basic connections to deploy those applications and services.

Accordingly, the Commission should summarily dismiss Qwest’s Petition.

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The Ad Hoc Telecommunications Users Committee (“Ad Hoc” or “the Committee”) submits these Reply Comments pursuant to the Commission’s July 30, 2004 Public Notice in the docket captioned above.¹ As detailed in the following paragraphs, Ad Hoc urges the Commission to summarily dismiss Qwest’s petition.

I. DISCUSSION

The members of the Ad Hoc Telecommunications Users Committee are companies who share a common characteristic: they are heavily dependent upon

¹ See Public Notice, “Wireline Competition Bureau Extends Comment Cycle on Qwest’s Petition for Forbearance in the Omaha Metropolitan Statistical Area,” DA 04-2440 (rel. July 30, 2004).

reliable, competitively-priced telecommunications services. No Ad Hoc members are carriers and the Committee accepts no carrier funding. Though its positions may occasionally coincide with those of carriers, it advocates only those public policy and regulatory outcomes that protect the interests of end users by fostering competition where it is possible and relying on regulation only where it is not. Currently, the Committee membership includes nine of the Fortune 100 companies and thirteen of the Fortune 500. As an entity composed of, and funded exclusively by, enterprise customers, Ad Hoc provides a uniquely credible perspective on the factual claims and policy positions espoused by carriers.

Because Ad Hoc members are heavy purchasers of telecommunications, they are typically the first beneficiaries of any de-regulatory regime for telecommunications and therefore are the first to urge de-regulation when markets become competitive. But nothing in the record of this proceeding establishes that Qwest faces price-constraining competition for enterprise customer services in the markets for which it seeks forbearance. Moreover, as detailed further in the white paper attached to these reply comments, the incumbent local exchange carriers ("ILECs"), and Qwest in particular, have demonstrated that they are not shy about exploiting their market power by charging supracompetitive prices. Accordingly, Ad Hoc joins those parties who have opposed Qwest's petition and urges the Commission to reject it.

A. The Record Requires Summary Dismissal of Qwest's Unsupported and Meritless Petition for Forbearance

Ad Hoc's assessment of Qwest's Petition for Forbearance is consistent with the consensus of the initial comments filed in this proceeding: Qwest's Petition is overly broad, with sloppy analysis and virtually no supporting evidence. The Committee's comments below are based upon evidence that Ad Hoc has presented to the Commission repeatedly in recent years, demonstrating that enterprise customers continue to lack competitive alternatives for access services and, in particular, special access. Rather than dedicate its limited resources to Qwest's bold but analytically flimsy Petition, the Commission should focus on retooling its regulatory regime for special access to address market failures for those services.

As other parties' initial comments establish, Qwest has failed to demonstrate that competitive conditions in the Omaha MSA justify any of the alternative deregulatory actions it requests from the Commission. Qwest's evidentiary support suffers from numerous defects, the most significant of which are the following:

- Qwest claims that the "relevant product market" for which it seeks forbearance is "the market for services provided under Section 251(c) and selected services under Section 271."² Yet it presents evidence related to competition for *retail local exchange services*, not the services and network elements purchased by CLECs pursuant to Section 251(c) and 271, and then asks the Commission to forbear from

² See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), filed June 21, 2004, at 6 ("Qwest Petition").

enforcing the regulations applicable to the access services Qwest provides to other carriers and to enterprise customers.³

- To the extent that Qwest presents any relevant evidence, its evidence is inaccurate,⁴ incomplete,⁵ speculative,⁶ and unverifiable.⁷
- Qwest fails to relate the few verifiable facts it does present to the legal showings necessary to meet the Section 10 forbearance standard.⁸

The Ad Hoc Committee agrees with the parties who maintain that these deficiencies and others justify summary dismissal of Qwest's petition.⁹

Ad Hoc is especially concerned, however, by the first defect identified above, namely, Qwest's failure to distinguish between (1) the services it is

³ Cf. Qwest Petition at pp. 6, 21-29, and 32. See also AT&T at 5-6; Cox at 14; Sprint at 2-3; MCI at 6.

⁴ For example, "Qwest does not appear to know what counties are in the Omaha MSA." Cox at 16; see also AT&T at 8 ("By including within its retail market share analysis those portions of the MSA where it does not even offer service, Qwest has artificially minimized its market share."). Cox also presents evidence showing that Qwest overestimates Cox's actual retail customers by 30 percent. Cox at 17-18. Whereas Qwest asserts that Cox provides telephony service "throughout all of Qwest's service territory in the Omaha MSA," Cox counters that it does not, in fact, serve six of the twenty-four wire centers identified as comprising Qwest's service area. Cox at 18, quoting Qwest Petition at 8.

⁵ For example, as Cox points out, while Qwest points wireless services as a form of competition, it fails to acknowledge that Qwest itself, through an affiliate, is a significant provider of wireless service in the Omaha MSA. Cox at 19.

⁶ For example, AT&T points out that "Qwest's retail market share analysis also depends in large measure on E911 data, which is 'an inaccurate and unreliable measure of competition in the local market.'" AT&T at 9. As AT&T also discusses, Qwest fails to show that the data it references in two surveys concerning wireless substitution apply to Qwest's Omaha MSA customer base. See AT&T at 20-21.

⁷ For example, as AT&T notes, Qwest relies on two surveys, one internal and one by an outside firm, in connection with its claims about wireless substitution, but has furnished neither of these surveys to the Commission. AT&T at 20.

⁸ As Cox states, in recommending summary dismissal of Qwest's petition, "Qwest has made no attempt to make the particularized showings required by Section 10. It has made no connection between its claims concerning market share and the effects forbearance would have on competitors; has not addressed any of the implications of forbearance; has not shown that regulations are burdensome; and has not made even a cursory effort to show that it has fully implemented Sections 251 and 271. These facts alone justify dismissal." Cox at 22.

⁹ Cox at 4, 22-23; AT&T at 6.

required to provide to competing local exchange carriers (“CLECs”) pursuant to the market-opening requirements of Sections 251(c) and 271, which it claims are fully competitive; and (2) the access services it provides to interexchange carriers (“IXCs”), enterprise customers, and CLECs pursuant to the Commission’s price caps and rate of return rules in Parts 61 and 65 of the Commission’s Rules.

Qwest initially identifies the relevant product market for which it is seeking forbearance as “the market for services under Section 251(c) and selected services under Section 271.”¹⁰ However, thirty pages into its Petition, Qwest abruptly veers away from this request and argues that the Commission should forbear from regulating Qwest as a dominant carrier for all “telecommunications services”¹¹ in “the Omaha MSA telecommunications market,”¹² which would include the special access and other services Qwest provides to members of the Ad Hoc Committee and other enterprise customers. And the regulations from which Qwest seeks to be relieved are the price caps and rate of return regulations applicable to Qwest’s interstate access services.

In other words, Qwest defines a market for one product, proffers evidence relevant to competitive conditions in a different market, and relies on that evidence to request forbearance from the rules that apply to a third market.

As the evidence filed with the Commission repeatedly by Ad Hoc shows, however, competitive alternatives for these services are still very limited and the

¹⁰ Qwest Petition at 6.

¹¹ *Id.* at 31.

¹² *Id.* at 32.

ILECs' excessively high prices reflect these non-competitive conditions.

Accordingly, the Commission must reject Qwest's overbroad and unsupported petition.

B. The Commission Must Confront the "Fact Gap" Between ILEC Claims and the Actual Experiences of Business Customers With Regard to Local Competition

In its petition, Qwest perpetuates a familiar misconception: that there will automatically be robust competition for the local exchange and exchange access services used by enterprise customers, if there is *any* competition for telecommunications services in a given geographic market, because large businesses are highly attractive as potential customers. The Commission is obligated, however, to adopt policies that reflect reality and a sound factual record, not the hypotheses or competitive aspirations of the ILECs. For the past several years, the Ad Hoc Committee has repeatedly submitted detailed evidence to the Commission demonstrating that competition for special access services has, in fact, failed to develop and that consequently, the ILECs, including Qwest, continue to exercise market power with respect to the prices and service levels of these services. In comments and reply comments filed in the *Pricing Flexibility Rulemaking*,¹³ the *Performance Standards Rulemaking*,¹⁴

¹³ *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, and CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999), *aff'd sub nom WorldCom, Inc. v. FCC*, 238 F. 3d 449 (D.C.Cir. 2001) ("*Pricing Flexibility Rulemaking*"), Comments of the Ad Hoc Telecommunications Users Committee (October 26, 1998) and Reply Comments of the Ad Hoc Telecommunications Users Committee (November 9, 1998).

¹⁴ *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed

the *Broadband Regulation Rulemaking*,¹⁵ the *Broadband Wireline Internet Access Rulemaking*,¹⁶ and, more recently, in its support of the *AT&T Special Access Rulemaking Petition*,¹⁷ Ad Hoc demonstrated that:

- Despite their tremendous buying power, Ad Hoc members have few, if any, competitive alternatives to ILEC special access services.
- Rates for special access services subject to pricing flexibility, rather than declining in response to competition, have risen to unprecedented levels.
- ILECs' rates of return with respect to special access services are clearly excessive – again an indication of the lack of competition.

Ad Hoc has recently updated the relevant evidence in a white paper entitled “Competition in Access Markets: Reality or Illusion,”¹⁸ which was prepared by Ad Hoc's economic consultants, Economics and Technology, Inc. The paper appears as Attachment A to these Reply Comments and was filed as an *ex parte* submission in each of the dockets identified above.

Rulemaking, 16 FCC Rcd 20896 (2001) (“*Performance Standards Rulemaking*”), Comments of the Ad Hoc Telecommunications Users Committee (January 22, 2002) and Reply Comments of Ad Hoc Telecommunications Users Committee (February 12, 2002).

¹⁵ *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (“*Broadband Regulation Rulemaking*”), Comments of Ad Hoc Telecommunications Users Committee (March 1, 2002).

¹⁶ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (“*Broadband Wireline Internet Access Rulemaking*”), Reply Comments of Ad Hoc Telecommunications Users Committee (July 1, 2002).

¹⁷ *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593, DA 02-2913 (rel. October 29, 2002) (“*AT&T Special Access Rulemaking Petition*”), Comments of Ad Hoc Telecommunications Users Committee (December 2, 2002).

¹⁸ *Competition in Access Markets: Reality or Illusion (A Proposal for Regulating Uncertain Markets)*, prepared for the Ad Hoc Telecommunications Users Committee by Economics and Technology, Inc., August 2004 (“*Access White Paper*”).

Qwest's Petition is another ILEC deregulation request that is long on rhetoric and short on facts. It asserts the existence of competition for services provided to enterprise customers without providing any substantial evidence relevant to competition for the services on which those customers rely (in particular, high-capacity special access service). In the *Access White Paper*, Ad Hoc reviews and updates the evidence that it had previously provided to the Commission and shows that (1) the competitive availability of "last mile" connections for large business users remains very limited; (2) intramodal alternatives specifically have failed to achieve widespread deployment; and (3) intermodal options, such as cable and fixed wireless, are currently not realistic alternatives for most business applications, regardless of their long-term promise.¹⁹

In their initial comments, numerous parties have also condemned Qwest's failure to present any discrete evidence of competition for access services purchased by enterprise customers or by carriers on their behalf.²⁰ According to MCI, Qwest "retains a monopoly grip over large segments of the market for enterprise exchange service." MCI goes on to observe that Qwest has failed to provide any specific evidence regarding either the extent or location of facilities-based competition for business customers from Cox or any other provider in the

¹⁹ See *Access White Paper* at Chapter 2 ("No Way Out: The Lack of Alternatives to Special Access").

²⁰ See, e.g., AT&T at 12; MCI at 3.

Omaha MSA.²¹ With respect to competition for services used to serve the enterprise market, AT&T and Time Warner Telecom each cites back to the Commission's recent TRO findings regarding economic barriers to CLEC deployment of loop facilities (including DS1 and DS3 loops).²² AT&T reminds the Commission that "[it] still must rely upon Qwest's special access services for the overwhelming preponderance of its high-capacity loops in the Omaha MSA, even in the portion of the Omaha MSA with the highest concentration of enterprise customer locations – downtown Omaha itself."²³ This evidence, along with the record evidence in numerous other open dockets at the Commission, refutes Qwest's unsubstantiated claims of competition for special access services.

C. Deployment of Cable Telephony Throughout Residential Areas Does Nothing to Advance Competition for Facilities Used by Competitors to Serve Enterprise Customers

Qwest's description of cable telephony alternatives in the Omaha MSA focuses almost exclusively on conditions for retail residential customers (as it must, given the dearth of cable facilities in business districts). Qwest fails to provide any evidence that cable providers in the Omaha MSA have deployed and are offering the types of access services required to meet the needs of large business customers.

Qwest's unsupported claims that cable companies supply competitive alternatives for business services such as special access are inconsistent with

²¹ MCI at 16.

²² AT&T at 12; Time Warner Telecom at 8.

²³ AT&T at 35.

the actual experience of members of the Ad Hoc Committee. Their experience, as related in Ad Hoc's pleadings in the dockets referenced above and in Attachment A, is that:

- Cable deployment patterns continue to focus primarily on residential areas, so that cable infrastructures generally do not "pass" business locations.
- Because cable companies are primarily oriented toward a mass-market customer base, their telephony and data (cable modem) offerings generally compare unfavorably to ILEC offerings in the critical areas of service reliability and security.
- Recent data suggests that cable providers nationwide supply connections to less than one percent of potentially addressable business locations.

The experience of Ad Hoc's members is consistent with the descriptions provided by other parties in this proceeding. As Time Warner notes:

Cable companies use their own Hybrid Fiber Coaxial ("HFC") networks to provide cable modem service to residential and some small business customers. However, many downtown areas where large businesses are located are outside of cable's network footprint. Moreover, the limited upstream capacity of cable modem service, HFC's shared architecture that can lead to service slowdowns, and the absence of other features demanded by enterprise customers make cable modem service unsuitable for most of the enterprise market.

Discussing the present situation in the Omaha MSA with respect to Qwest's main cable competitor, Sprint reports that "[Cox] cannot yet offer the full range of bundled services that Qwest is deploying, particularly DS3 and higher capacities that are critical in the business market."²⁴ Time Warner similarly

²⁴ Sprint at 17.

observes that “[w]hatever impact Cox’s circuit switched telephony and cable modem offerings may have on competition in the mass market, all cable companies, including Cox, are just as reliant as other CLECs on incumbent LEC transmission facilities when they attempt to serve business customers.”²⁵

D. Qwest’s Evidence Regarding Wireless Substitution Is Meaningless in the Large Business Context

While Qwest makes broad assertions about wireless substitution by residential customers, it fails to establish that competition from wireless services can prevent Qwest from abusing its market power over the local wireline bottleneck in Omaha. As noted by AT&T, the Commission’s *Triennial Review Order* emphasized that “wireless CMRS connections in general do not yet equal traditional landline local loops in their quality, their ability to handle data traffic, and their ubiquity.”²⁶ Moreover, Qwest’s Petition and the supporting materials fail to make any connection between the availability of mass market wireless offerings and the competitive needs of enterprise customers. As MCI correctly points out, “wireless substitution is not at all a factor in the enterprise marketplace, or the market for dedicated access services.”²⁷

The Ad Hoc Committee has repeatedly provided evidence to the Commission that its members are not, at present, able to make use of fixed wireless as a competitive alternative to special access. As Ad Hoc discusses in

²⁵ Time Warner Telecom at 10.

²⁶ AT&T at 18, citing *Review of Section 252 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) at ¶ 230 (“*Triennial Review Order*”).

²⁷ MCI at 8.

Attachment A, the deployment of fixed wireless has fallen far short of both the expectations of the late 1990s and the more recent marketing claims by the ILECs. Ad Hoc estimates that, optimistically, nationwide fixed wireless lines account for less than two one-hundredths of one percent of the special access voice-grade equivalent lines.²⁸

E. VoIP Deployment Does Not Free Enterprise Customers From Their Dependency on “Last-Mile” Transmission Services

Qwest identifies VoIP as a “quickly evolving ... direct substitute for Qwest wireline telephone service.”²⁹ Qwest proffers no factual support for this claim, which is, in any case, inherently illogical. VoIP is not an “alternative” or “substitute” for the exchange access services that Qwest provides; it is an application that requires users to obtain transmission services, such as exchange access or local exchange service, in order to deploy it. Even VoIP users must still purchase a connection from the ILEC or, if available, from an alternative provider (*e.g.*, the local cable company, in the case of residential customers). As discussed previously, however, since cable facilities rarely pass enterprise customer locations and suffer from other technological limitations when it comes to the needs of enterprise customers, cable transmission services are not a viable competitive alternative for business users.

²⁸ Access White Paper at 24.

²⁹ Qwest Petition at Exhibit A, p. 26.

In its recent comments in the Commission's *VoIP Rulemaking*,³⁰ Ad Hoc emphasized that the use of the Internet for transmission of voice calls in addition to data does not in any way diminish large users' reliance on ILEC-provided access services. Ad Hoc pointed out that:

No matter how competitive the market may be for the services and equipment (including software) required to obtain or provide IP-enabled applications and services, customers and service providers must still use basic transmission facilities and telecommunications services to access those applications and services.³¹

Thus, even if Qwest had shown that business users in Omaha were making significant use of VoIP (which it has not),³² this fact would not be relevant evidence of a competitive alternative for the transmission services that enterprise customers must use in order to deploy IP-enabled applications and services.

³⁰ *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*VoIP Rulemaking*").

³¹ *VoIP Rulemaking*, Comments of the Ad Hoc Telecommunications Users Committee (May 28, 2004) at 9.


³² MCI at 9 ("Qwest provides no data on how widespread this phenomenon is within the Omaha MSA. And, as with wireless services, Qwest's evidence, such as it is, concerns almost exclusively the residential marketplace."); AT&T at 4 ("Qwest also cites to the presence of providers of voice-over-Internet protocol ("*VoIP*") services in Omaha while its own petition concedes that two of these alleged providers are not offering service in the Omaha MSA. Indeed, the evidence shows that none of the purported VoIP providers are offering significant service – if any – in the Omaha MSA."); see *also*, Time Warner Telecom at 14.

II. CONCLUSION

For the reasons discussed above, the Ad Hoc Telecommunications Users Committee requests that the Commission summarily dismiss Qwest's Petition for forbearance.

Respectfully submitted,

AD HOC TELECOMMUNICATIONS USERS
COMMITTEE


By: _____
Counsel for Ad Hoc Telecommunications
Users Committee

September 23, 2004

CERTIFICATE OF SERVICE

I, Michaelleen Terrana, hereby certify that true and correct copies of the preceding Reply Comments of Ad Hoc Telecommunications Users Committee were served this 23rd day of September, 2004 via the FCC's ECFS system, and by electronic mail upon the following:

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